

# the dana report

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## ABOUT THE FIRMS

Dana Consulting Group, Ltd. and Jennings Law Firm, Ltd. were established to provide employers with a single source of comprehensive legal and consulting services relating to retirement plan and employee benefit matters.

## QUOTES

An obstacle is something you see when you take your eyes off the goal.  
- Anonymous

Adversity is the springboard to great achievement.  
- Anonymous

What is the difference between an obstacle and an opportunity? Our attitude toward it. Every opportunity has a difficulty, and every difficulty has an opportunity.  
- J. Sidlow Baxter

Route To:

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## Suspending 3% Safe Harbor Contribution

The IRS recently issued proposed regulations that permit employers who are experiencing substantial business hardships to suspend their 3% safe harbor contributions during the year. This is a change from the Service's prior position that the plan sponsor could not terminate its liability for this safe harbor contribution without terminating the plan.

There are certain conditions attached to the new rule, such as a 30-day advance notice and the employer still must make the contribution through the effective date of the suspension. But it is welcome relief to many employers who were faced with possibly terminating their 401(k) plans to avoid making this contribution.

Please contact Lee T. Jennings in our office if you have any questions. ■

## 2009 Required Minimum Distributions Updated

Our March 2009 issue informed readers that Congress had suspended the rule that certain required minimum distributions (RMDs) be made from defined contribution plans and IRAs. We have received numerous questions on the following issues:

- This rule is not mandatory. Employees and IRA owners may still take distributions during 2009.
- Distributions from defined contribution plans that are waived under this rule may be rolled over into IRAs.
- Plan amendments to conform to the new rules are not required until 2011. ■

## Reasonable Compensation

It is a well known rule that an employer can only deduct compensation that is "reasonable." This can be a double-edged sword. Compensation that is deemed unreasonable is still fully taxable to the employee-recipient, even if the employer cannot deduct it. This means it gets taxed twice.

Treatises have been written about what constitutes reasonable compensation, and it is an extremely complex issue. But we have located a great article on this topic

which is on our website under the Education Section. Our website is [www.danaconsulting.com](http://www.danaconsulting.com). ■

## Advisors Move Away from Specialization

According to a study by the Retirement Income Industry Association (RIIA), financial advisors will likely need to take on broader roles with their clients going forward. That will translate into a need to develop strategic partnerships with other expertise. These partnerships, however, are not just relationships to refer clients back and forth. The legal and regulatory environment is growing increasingly complex. Government agencies and officials cannot issue guidance fast enough, and in many cases do not even have the "answers." As complexity increases, advisors will need to identify partners who can be relied upon to develop "solutions" to problems for which the government has no answer (or has not even identified yet).

Qualified retirement plans are a perfect example of an environment that will continue to grow increasingly complex. Moreover, with the dire financial situation facing Social Security, employer-provided retirement plans will likely be the primary source of retirement income for many Americans. This is a monumental challenge facing financial advisors.

Advisors who fail to develop these necessary strategic partnerships may ultimately be forced out of servicing qualified retirement plan clients. The resources and time needed to keep up with increasing governmental regulations will force the marginal players out and their plans will move to the better equipped advisors. ■

## 401(k) Plan Reform

Employer 401(k) plans have been battered severely over the past couple of years, between dramatic investment declines to lawsuits on the one hand, to Congressional action relating to plan expenses and greater transparency on the other.

Some pundits have been predicting that the government will abolish the entire employer retirement plan system and put us all into a system that is somewhere between 401(k) and Social Security.

Brian Graff, executive director of ASPPA (a trade association for the retirement plan industry), is somebody who has an inside

seat at where things are headed, and he recently shared his insights at a recent seminar of industry players.

1. Congress may be saying "everything is on the table," but don't expect it to dismantle a system that presently holds about \$7 trillion overnight. Congress simply does not work like that.
2. Believe it or not, Congressional members really do understand that employer-sponsored plans, particularly 401(k) plans, represent for a vast number of American workers their best chance of saving for a decent retirement.
3. All of the above said, Brian fully expects Congress to institute "reform":
  - a. What constitutes a "target date fund" will get changed and Congress may appoint some kind of "board of experts" to decide what constitutes a "qualified default investment fund (QDIA)."
  - b. Fee disclosure rules will get changed. This apparently is a real hot button right now with Congress. The Labor Dept's proposals will NOT be finalized in their present form.
  - c. Congress wants more workers covered under some kind of retirement savings program. The White House proposal would require all employees not covered by a qualified plan be offered some kind of payroll deduction IRA. Brian gives this proposal a "better than 50% chance" at this point. ■

### **Recent 404(c) Court Decision**

ERISA Section 404(c) provides protection to a 401(k) plan's fiduciaries from the investment elections made by plan participants. A recent New Hampshire district court decision highlights what continues to be a misconception of the scope of protection provided by Section 404(c).

The court stated what is generally understood as settled law and is consistent with the position of the U.S. Dept. of Labor, which is that Section 404(c) does NOT shield the fiduciaries from liability for the selection and monitoring of plan investments. Section 404(c) protects the fiduciaries from losses resulting from

participant's exercise of control over their investment elections.

Fiduciaries must continue to develop and implement procedures by which the selection - and continued maintenance - of each designated investment option is determined to be prudent. Those procedures should include the maintenance of an investment policy statement, a process for the selection and periodic review and monitoring of the investment funds, the retention of investment professionals as appropriate, and procedures for documenting the entire process.

We continue to see new clients with prior use of "canned" investment policy statements downloaded from websites that bear no relation to the plan's actual investment practices. These canned IPSs were downloaded in the interest of saving money, and the perception that they were needed just to "paper the file." In our own view, these canned IPSs are worse than having no statement at all. ■

### **Miscellaneous**

- Congress is considering a measure to provide federal employees with four weeks of paid leave for the birth or adoption of a child. This is on top of up to 12 weeks of unpaid leave federal employees already get for this under the Family and Medical Leave Act (FMLA). American Federation of Government Employees' union president, John Gage, thinks this is a great idea and says, "The time has come for the federal government to set the standard for U.S. employers on paid parental leave".
- Presently, FMLA (see previous article) only applies in the private sector to companies employing 50 or more workers. Congress is thinking about changing that too and extending FMLA leave to all employers. Who pays for all of this? One proposal is a "self-funding" program paid for through a payroll tax of .2% of wages. One of the Congressional sponsors is George Miller who says employers actually benefit from these kinds of laws through "increased recruitment and retention rates ... and improved productivity." He does not say where the productivity gains come from when everybody is home on leave.
- PLANADVISER magazine annually ranks 401(k) providers based on

service. Their December 2008 survey showed the following:

- ADP Retirement Services. 10.3% favorable and 66.2% not favorable.
  - Paychex. 5.5% favorable and 74.3% not favorable.
- Cheap is not always the best approach. ■

### **Workplace Issues**

- Many of us have high school or college age children who are pondering career options. It seems that what were great careers a generation ago are either not so great anymore or even non-existent. According to the *2009 Student Survey* published by the National Association of Colleges and Employers, even though fewer jobs are available right now, accounting majors are still in high demand. Accounting and engineering grads were among the most likely to have already found jobs.
- Workplace stress is becoming a chronic ailment with global reach. According to a survey by Robert Half, a global recruiting firm, 48% of US managers cited increased stress among their staff. The most commonly cited causes were increased workloads and decreased morale. Less than one-third of respondents said their staff remained unaffected.
- On the issue of workplace stress, a nationwide survey by Career Builder.com, 30% of employees who survived layoffs experienced some level of burnout. Among the survivors, 47% were given additional responsibilities and 34% said they were working longer hours. Experts give the following advice to keep your stress levels in check:
  - Don't promise what you cannot deliver. Keep your supervisors informed of your workload and time constraints.
  - Take some time. Get plenty of rest and decompress by taking lunch time walks. If you have earned personal days, take them.
  - Explore flex work arrangements. Working from home periodically saves commuting time and helps balance work/home duties.
  - Ignore the rumors. With so many workers fearing layoffs, it's difficult not to talk about it. You will be less stressed if you avoid the rumor mill and focus on your work at hand. ■



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